UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JACOB RUDOLPH, MARK HANSEN, and JASON BUFFER individually and on behalf of all others similarly situated, Plaintiff, v. UNITED AIRLINES HOLDINGS, INC., and UNITED AIRLINES, INC., Defendants.	Case No. 1:20-cv-02142 Hon. Thomas M. Durkin Magistrate Judge Jeffrey T. Gilbert

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

Companies around the world have been impacted by the current economic climate and a concomitant decrease in consumer demand following COVID-19. Most have tried to navigate these turbulent economic waters while accommodating their customers (many of whom are struggling financially). Defendants United Airlines Holdings, Inc. and United Airlines, Inc. (collectively, "United"), however, have shifted the recession's costs onto their customers by refusing to issue refunds for flights United cancelled, thereby breaching its Contract of Carriage ("Contract" or "COC"). Accordingly, Plaintiffs bring this action for breach of contract.[1]

United's Motion to Dismiss, ECF No. 45 ("Motion" or "Mot."), hinges on an erroneous, self-serving defense to the merits of Plaintiffs' claims: that United cancelled Plaintiffs' flights due to a force majeure event. Nonsense. Plaintiffs do not allege that COVID-19 cancelled their flights—they allege United did to stem financial losses due to decreased demand. And United did not cancel their flights because COVID-19 posed a safety risk. Were that the case, United would have cancelled (and *would continue* to cancel) *every* flight. It did not, and has not (and, in fact, promotes its current safety measures to further passenger demand). United's statements confirm it cancelled the majority of its flights for one simple reason: reduced passenger demand made it uneconomical to operate its regular schedule, which would have required United to operate undersold flights. Because United cancelled Plaintiffs' flights due to economic considerations—not a force majeure event—United plainly breached its obligation under the Contract to refund Plaintiffs and the Class. The Court should deny United's motion in its entirety.

II. STATEMENT OF FACTS

United Airlines is one of the largest airlines in the world. Prior to the pandemic, United

[1] All Complaint or "¶" references are to the Consolidated Class Action Complaint. *See* ECF No. 41.

operated over 4,900 flights a day to 362 airports across six continents carrying over 162 million passengers per year.[2] But as COVID-19 spread around the globe, demand for air travel decreased significantly and, as a result, United slashed its flight schedule.[3]

A. United's Contract of Carriage Requires Refunds for Flights United Cancelled.

United's Contract provides that "[t]ransportation of Passengers and Baggage . . . are subject to the following terms and conditions," and that "[b]y purchasing a ticket or accepting transportation, the passenger agrees to be bound by these controlling terms . . . ."[4] Several Contract provisions, referred to therein as "Rules," are pertinent to this action.

Rule 24 sets forth the manner in which United categorizes events that result in flight delays or cancellations, which in turn determines the financial relief to which affected passengers such as Plaintiffs are entitled. The Rule identifies three relevant categories of delays and cancellations:

- A ***Schedule Change*** is "an advance change in UA's schedule (including a change in operating carrier or itinerary) that is not a unique event such as Irregular Operations or Force Majeure Event . . . ." Rule 24.B.1 (emphasis added). A Schedule Change, according to Rule 24's plain terms, thus describes instances in which United modifies flight schedules in advance due to reasons other than unique (*i.e.*, one-off) events such as force majeure or Irregular Operations. Indeed, United implicitly concedes that any advance change in schedules **not due** to force majeure or Irregular Operations constitutes a Schedule Change as defined in Rule 24.B.1.[5]

- ***Force Majeure Events*** refer to unique occurrences that either (1) **physically prohibit** United from operating flights (*e.g.*, acts of God, governmental regulations, strikes, damaged aircraft etc…), (2) prohibit United from operating flights because doing so would **expose passengers to a substantial risk of bodily harm** (*e.g.*, "riots, terrorist activities, civil commotions, embargoes, wars, hostilities, disturbances, or unsettled international conditions[,]"), or (3) present an "emergency situation requiring **immediate** care or protection for a person or property . . . ."[6]

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[2] ¶¶ 38-39.

[3] ¶¶ 57-58.

[4] COC, 1.

[5] *See* Mot., 9.

[6] Rule 24.B.4 (emphasis added).

- ***Irregular Operations*** are "irregularities," including but not limited to "flight or service cancellation, omission of a scheduled stop, or any other delay or interruption in the scheduled operation of a carrier's flight," and cancellations by United pursuant to Rule 5, which addresses cancellations for reasons other than those set forth in Rule 27 (primarily customer malfeasance, overbooking, and a failure to pay for one's seat). Rule 24.B.7. Again, per Rule 24.B.1, Irregular Operations explicitly refer to unique events, rather than extensive changes to United's schedules.

The manner in which United categorizes a delay or cancellation matters because it determines the remuneration the Contract requires United to provide affected passengers. Prior to June 2020, if United cancelled a flight due to a unique Force Majeure event, ticketed passengers were entitled only to travel credits. However, if United cancelled or delayed flights due to a Scheduling Change or Irregular Operations and did not rebook passengers on other flights within specified timeframes, the Contract **required** United to issue refunds "upon request."[7] And per Rule 27 ("Refunds"),[8] United must refund its customers for the unused portions of any ticket under Rule 27.A.1, as well as baggage charges and upgrade fees under Rule 27.C.1, .3.

Rule 3.B of the Contract sets forth passengers' rights to refunds as required under applicable laws, regulations, rules, or security directives, such as the United States Department of Transportation's ("DOT") rules applicable to passenger refunds:

> This Contract of Carriage is subject to applicable laws, regulations, rules, and security directives imposed by governmental agencies, including but not limited to those imposed during or as a result of a national emergency, war, civil unrest or terrorist activities. In the event of a conflict between the Rules contained herein and such government laws, regulations, rules, security directives and their corresponding effects on UA's operation, the latter shall prevail.[9]

United's contractual obligation to refund passengers is consistent with the DOT's longstanding rule concerning refunds: "If your flight is cancelled and you choose to cancel your trip as a result,

[7] *See* Rule 24.C.4 (citing to Rule 27.A ("Involuntary Cancellations"); Rule 24.E.3 (same).

[8] ¶¶ 108-109.

[9] ¶ 111; Ex. B at Rule 3.

you are entitled to a refund for the unused transportation—even for non-refundable tickets."[10]

Accordingly, the Contract and applicable rules clearly and unambiguously entitled Plaintiffs and similarly situated passengers to refunds for cancelled or changed flights. United, however, chose to breach its contractual duty in the midst of a global pandemic. During March 2020, United altered its refund practices, ultimately announcing it would provide only credits for future flights, even though its Contract required refunds.[11] United also took a variety of steps to make it difficult, if not impossible, for consumers to receive a refund. [12] United, in other words, flouted its contractual obligations and breached the Contract.

B. Plaintiffs Purchased Tickets on Flights United Later Cancelled.

Plaintiff Buffer purchased roundtrip tickets on United's website for travel from New York, New York, to Athens, Greece, connecting via Frankfurt, Germany, for a trip beginning on March 19, 2020.[13] After United cancelled a leg of his trip to Athens, Greece, United denied Plaintiff Buffer's request for a refund.[14] United initially refused to provide a refund, and instead only

[10] ¶ 70. *See also* Flight Delays & Cancellations, U.S. Department of Transportation (Mar. 4, 2020), *available at* https://www.transportation.gov/individuals/aviation-consumer-protection/flight-delays-cancellations. On April 3, 2020, during the pandemic, the DOT reiterated "airlines' obligations to refund passengers for cancelled or significantly delayed flights remains unchanged." ¶¶ 71-73. *See also* 14 CFR § 259.5(b)(5); *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011). Nevertheless, continued failures of United and other airlines to provide refunds consistent with longstanding obligations prompted the DOT to release a second enforcement notice on May 12, 2020, reiterating "airlines have an obligation to provide a refund to a ticketed passenger when the carrier cancels or significantly changes the passenger's flight, and the passenger chooses not to accept an alternative offered by the carrier." ¶¶ 75-76. *Frequently Asked Questions Regarding Airline Ticket Refunds Given the Unprecedented Impact of the COVID-19 Public Health Emergency on Air Travel*, DOT (May 12, 2020), *available at* https://www.transportation.gov/sites/dot.gov/files/2020-05/Refunds-%20Second%20Enforcement%20Notice%20FINAL%20%28May%2012%202020%29.pdf ("Second Enforcement Notice").

[11] ¶ 67.

[12] ¶¶ 62, 77.

[13] ¶ 29.

[14] ¶¶ 29-33.

offered Plaintiff Buffer a rebooking or a cancellation of the rest of the trip and flight credits.[15]

Plaintiff Hansen purchased roundtrip tickets for travel beginning on March 28, 2020 from Vancouver, British Columbia to Liberia, Costa Rica, connecting via Houston, Texas.[16] United changed Plaintiff Hansen's itinerary several times, cancelling flight legs and rebooking him on new flights.[17] Ultimately, United cancelled his entire itinerary[18] and refused to issue him a refund.[19]

Plaintiff Rudolph purchased tickets for travel from Minneapolis/St. Paul, Minnesota to Hilton Head Island, South Carolina, connecting via Chicago, Illinois, for a trip beginning on April 4, 2020.[20] Plaintiff Rudolph submitted a written refund request for his tickets.[21] However, United denied Plaintiff Rudolph's requests and offered either a rebooking or credits for travel within one year of the original ticket issue date.[22] Even though United cancelled at least one segment of Plaintiff Rudolph's itinerary, United refused to provide a refund.[23]

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[15] ¶ 30. Subsequent to filing the Complaint, United refunded Plaintiff Buffer. This does not eliminate his standing (or the damage United's breach of contract caused him). *See Dieffenbach v. Barnes & Noble, Inc.*, 887 F.3d 826, 827 (7th Cir. 2018) (customers had standing as they "temporarily lost the use of their funds while waiting for banks to reverse unauthorized charges to their accounts"). Even if he personally lacked standing, the Court still has Article III standing given the other plaintiffs. *See Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2379 n.6 (2020) ("Under our precedents, at least one party must demonstrate Article III standing for each claim for relief."). United also refunded five prior plaintiffs in this matter, presumably in an effort to pick-off named plaintiffs while evading its obligations to the Class. *See* ¶ 7 n.1.

[16] ¶ 22.

[17] ¶ 23.

[18] *Id.*

[19] ¶¶ 21-27.

[20] ¶ 13.

[21] ¶ 15.

[22] ¶ 16.

[23] ¶¶ 12-20.

III. ARGUMENT

A. United Breached Its Contractual Duty to Issue Refunds to Plaintiffs and the Class.

When a contract term is disputed, "the threshold inquiry is whether the contract is ambiguous."[24] Under Illinois law, "[t]he primary objective in construing a contract is to give effect to the intent to the parties."[25] Courts "must initially look to the language of a contract alone, as the language, given its plain and ordinary meaning, is the best indication of the parties' intent."[26] However, "[a] contract must be construed as a whole, viewing each part in light of the others."[27] Courts are to "attempt to give meaning to every provision of the contract and avoid a construction that would render a provision superfluous."[28]

Consistent with these principles, the Contract clearly and unequivocally obligates United to issue refunds to Plaintiffs and Class members whose flights it cancelled without rebooking them on alternative flights. United did not cancel their flights due to "unique" events such as volcanic eruptions or terrorist attacks. Nor did the pandemic prohibit United (physically or otherwise) from operating Plaintiffs' flights. Plaintiffs allege United cancelled their flights for economic reasons: COVID-19 suppressed demand for flights, rendering United's existing schedule unprofitable. Indeed, United *chose* not to run the *majority* of its flights at levels well below capacity in order to avoid operating losses, as evidenced by the fact that it has operated a reduced schedule throughout the pandemic. Schedule Changes or Irregular Operations caused United to cancel Plaintiffs'

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[24] *Bourke v. Dun & Bradstreet Corp*, 159 F.3d 1032, 1036 (7th Cir. 1998) (citation omitted).

[25] *Gallagher v. Lenart*, 226 Ill.2d 208, 232-33 (2007) (citation omitted). United does not dispute Illinois law governs the Contract. Mot., 7 n.5.

[26] *Id.* at 233 (citation omitted).

[27] *Id*. (citation omitted).

[28] *Ken Heritage LLC v. Lake Plaza Prop. Holding, LLC*, No. 18-CV-211, 2020 WL 533699, at *4 (N.D. Ill. Feb. 3, 2020) (citation omitted).

flights, and each is entitled to a full refund. Federal law compels an identical outcome, because the Contract provides that if its terms conflict with federal law, federal law governs.

Interpreting the Contract accordingly is the only sensible manner in which to proceed because it gives independent legal effect to each of its provisions. To construe the Contract as United urges—*i.e.*, to allow it to cancel flights for any reason it deems "unforeseeable," withhold a refund and claim force majeure—would render superfluous provisions like those pertaining to Schedule Changes or Irregular Operations. United does not attempt to argue otherwise. It simply claims that the "Schedule Changes" or "Irregular Operations" provisions do not apply where force majeure does.[29] Force majeure, of course, has no bearing on Plaintiffs' claims. But even if United could credibly claim force majeure *might* apply, it merely would render the Contract "an ambiguous contract . . . one that 'may reasonably be interpreted in more than one way.'"[30] *Contra proferentem*—which requires that ambiguous terms be construed against the drafter— then would apply, or the meaning of the Contract would "become[ ] a question of fact for the jury."[31] Either way, United's Motion fails.

1. The Contract Unambiguously Requires United to Issue Refunds to Plaintiffs Because United Made an Economic Decision to Cancel Their Flights.

United cancelled each of Plaintiffs' flights prior to their scheduled departure dates through

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[29] Mot., 9.

[30] *Dyson, Inc. v. Syncreon Tech. (Am.), Inc.*, No. 17 C 6285, 2019 WL 3037075, at *9 (N.D. Ill. July 11, 2019) (quoting *Shapich v. CIBC Bank USA*, 2018 IL App (1st) 172601). *See also Commonwealth Edison Co. v. Allied-Gen. Nuclear Servs.*, 731 F. Supp. 850, 860 (N.D. Ill. 1990) ("Liability for breach of contract is strict—the plaintiff need not show that the defendant willfully or even negligently broke the contract—and defenses such as force majeure can be viewed as efforts to mitigate the strictness. If the breach is not involuntary but indeed willful, why should the burden of an event that makes performance impossible fall on the victim, a completely innocent party? Why in other words should the doctrine of impossibility allow the promisor by his deliberate breach to shift a contractually assumed risk to the promisee?").

[31] *Harmon v. Gordon*, 712 F.3d 1044, 1050 (7th Cir. 2013); *Premier Title Co. v. Donahue*, 328 Ill. App. 3d 161, 166 (2002).

"an advance change in [United's] schedule . . . ."[32] These cancellations were "not a unique event[.]"[33] To the contrary, between March and July United cancelled 10% to 50% of scheduled flights.[34] The changes clearly constitute "Schedule Changes," which required United to either "arrange" for one of the remedies provided for in Rule 24.C or issue full refunds "upon request."[35] The same is true even if United were to claim these cancellations were mere "irregularities."[36] The cancellations then would be due to "Irregular Operations," and the Contract likewise would obligate United to issue refunds.[37] Regardless of which provision applies, Plaintiffs are entitled to refunds.

United makes no real effort to explain why its cancellations were not due to Schedule Changes or Irregular Operations. It simply asserts, *ipse dixit*, that "COVID-19-related conditions caused it to cancel" Plaintiffs' and the Class' flights, and that COVID-19 constitutes a Force Majeure event subject to Rule 24.B.4.[38] United's argument is unavailing, because COVID-19 did not proximately cause its cancellations.[39] Indeed, as COVID-19 spread across the United States, United cancelled and rescheduled many, ***but not all***, fights.[40] For example, United cancelled Plaintiff Hansen's flight to Costa Rica, but not his flight from Vancouver to Houston.[41] In fact,

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[32] COC, Rule 24.B.1.

[33] *Id.*

[34] ¶¶ 57-58.

[35] COC, Rule 24.C.4.

[36] COC, Rule 24.B.7.

[37] *Id.* at Rule 24.E.3.

[38] Mot., 9 (Plaintiff Rudolph); *see also id.* at 10 (Plaintiff Hansen); 11 (Plaintiff Buffer).

[39] *See Glen Hollow P'ship v. Wal-Mart Stores, Inc.*, 139 F.3d 901, 1998 WL 84144, at *3 (7th Cir. 1998) (holding that a force majeure clause applies only when the event proximately caused nonperformance); *Northern Ill. Gas. Co. v. Energy Co-op., Inc.*, 122 Ill. App. 3d 940, 951 (3rd Dist. 1984) (same).

[40] ¶¶ 58-59.

[41] ¶ 23.

United continued (and continues) to operate flights despite the fact that COVID-19 has not abated (and has intermittently intensified throughout 2020).[42] United has done so ***because COVID-19 did not prevent United or any other airline from operating***. Nor could it. COVID-19 did not ground planes, call a strike, prevent takeoffs or landings, or cause wars or gas shortages.[43]

The pandemic did, however, cause demand to plummet.[44] *That* is why United cancelled flights while it reaped millions in government aid: to avoid additional losses due to operating flights below capacity.[45] United may claim otherwise, but Plaintiffs' allegations must be taken as true, both for purposes of this Motion and until and unless discovery proves otherwise. For the Contract's Force Majeure clause to apply, Plaintiffs' cancellations "must [have been] both directly and proximately caused by" COVID-19.[46] Plaintiffs plausibly allege otherwise. And, as United concedes, "[t]he [Contract] distinguishes among Involuntary cancellations due to Force Majeure, Irregular Operations, and Schedule Changes: where one is applicable, the others are not."[47] Because Force Majeure does **not** apply, either Schedule Changes or Irregular Operations **must**.

Nor can United credibly contend a financial recession is a Force Majeure event simply because it is "not reasonably foreseen, anticipated or predicted by [United]."[48] The events specified in Rule 24.B.4 consist entirely of occurrences that: physically prohibit United from operating flights; would expose passengers to a substantial risk of bodily harm; or present an "emergency situation requiring **immediate** care or protection for a person or property." Financial downturns

[42] ¶¶ 53-61.

[43] *See* COC, Rule 24.B.4.

[44] Compl. ¶¶ 56-60.

[45] *Id*.

[46] *Glen Hollow*, 1998 WL 84144, at *3.

[47] Mot., 9.

[48] COC, Rule 24.B.4.

pose no such risks, however, and the canon of "*ejusdem generis* . . . provides that '[w]here general words follow specific words[,] . . . the general words are construed to embrace only objects similar in nature to those objects enumerated by the preceding specific words."[49] To construe Rule 24.B.4 to treat financial downturns as force majeure events would allow its general exception for "unforeseen" events to swallow the rule.[50]

Interpreting the Contract as United suggests also would "nullify or render provisions meaningless."[51] United's self-serving construction would grant it carte blanche to cancel flights well in advance of scheduled departure dates, then claim the changes were indirectly caused by unforeseen events—say, because flights were booked at 20% capacity when they typically operate at 99%—in order to retain passenger funds. *Never* would United admit it cancelled flights due to a Schedule Change.

As this Court recognizes, "interpreting contracts so that major clauses fall out usually is not a sensible way to understand the parties' transaction."[52] Instead, "[w]hen there is a choice among plausible interpretations, it is best to choose a reading that makes commercial sense, rather than a reading that makes the deal one-sided."[53] Plaintiffs construe the Contract according to its terms and in a way that gives each provision effect. The Court should interpret it accordingly.

2. United Breached Its Contract When It Refused Plaintiffs' Refund Requests.

Because United cancelled Plaintiffs' flights due to Schedule Changes or Irregular

[49] *Dunhill Asset Servs. III, LLC v. Tinberg*, No. 09 C 5634, 2012 WL 3028334, at *7 (N.D. Ill. July 23, 2012) (holding "general equitable principles" limited to principles that operate in context of laws similar to those enumerated in notes).

[50] *See, e.g., TEC Olmos, LLC v. ConocoPhillips Co.*, 555 S.W3d 176, 185-86 (Tx. Ct. App. 2018) (applying *ejusdem generis* to conclude that a force majeure clause does not include economic downturn).

[51] *Lakeview Collection Inc. v. Bank of Am., N.A.*, 942 F. Supp. 2d 830, 849 (N.D. Ill. 2013) (Durkin, J.) (citation omitted).

[52] *Id*. (citation omitted).

[53] *Id*. (citation omitted).

Operations, the Contract required United to issue them refunds "upon request."[54] Each Plaintiff requested a refund from United, thus United breached the Contract when it denied their requests.[55]

Plaintiff Buffer: Although United devotes an entire page specifically to Plaintiff Buffer, it does not mount a credible challenge to his claims. United does not identify a single law that legally prohibited it from transporting him to Greece; acknowledges it cancelled his flight; and admits he requested a refund.[56] United undoubtedly breached its Contract with Plaintiff Buffer.

Plaintiff Hansen: United likewise musters little in the way of argument with respect to Plaintiff Hansen. Hansen alleges, and United does not dispute, that United repeatedly altered Hansen's flight itinerary in the weeks leading up to his departure, eventually cancelling it entirely.[57] Hansen then demanded that United refund his fare and United concedes it refused (*see* Mot., 10), thereby breaching its Contract with Plaintiff.

United nevertheless contends it is not obligated to refund Hansen for two reasons. Neither holds water. First, it is irrelevant whether the Costa Rican government restricted entry to citizens, residents, and foreign diplomats.[58] The restrictions did not *prevent* United from operating Hansen's flights, including his flight to Costa Rica.[59] Plaintiff may have been prohibited from entering, but it is United that chose to cancel his ticket. Second, Plaintiff "is seeking a refund from the [right] party."[60] It matters not that he purchased his tickets through Expedia. The Contract expressly states that "by purchasing a ticket or accepting transportation, the passenger agrees to be bound by these

[54] Rule 24.C.4; 24.E.3.

[55] ¶¶ 15-16, 18, 24-25, 30-31.

[56] Mot., 11.

[57] ¶ 23.

[58] Mot., 10.

[59] *See id.*

[60] *Id.*

controlling terms of this Contract of Carriage."[61] The Contract does not limit its application to passengers who purchased tickets directly through United. Plaintiff is entitled to a refund, and United breached the Contract when it refused to provide one.

Plaintiff Rudolph: Like Plaintiffs Buffer and Hansen, Plaintiff Rudolph purchased tickets on United only for United to ultimately cancel his flights.[62] Prior to doing so, however, United repeatedly refused Plaintiff's requests for refunds.[63] Plaintiff began to request refunds in early March 2020, when United publicly announced it planned significant schedule cuts.[64] Rudolph reasonably interpreted United's statements to mean cancellations would leave him stranded in South Carolina or Illinois, and, in light of its refusal to issue him a refund, that United intended to repudiate the Contract,[65] effectively forcing Plaintiff to cancel his itinerary.[66] United's conduct constitutes a breach, particularly because its actions preceded its cancellation of Plaintiff's flight.[67] Moreover, force majeure does not excuse United's misconduct because Minnesota's stay-at-home order, *see* Mot., 7-8, did not prohibit United from operating Plaintiff Rudolph's flights.

3. Even if the Contract Is Ambiguous, the Canon of *Contra Proferentem* Requires the Court to Construe the Contract in Favor of Plaintiffs.

The Contract is clear and unambiguous: it requires United to refund Plaintiffs and the Class for all flights United cancelled. United argues to the contrary, but (at best) it has raised the

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[61] COC at 1.

[62] ¶¶ 13, 17.

[63] ¶ 16.

[64] ¶¶ 15, 55-77.

[65] *Busse v. Paul Revere Life Ins. Co.*, 341 Ill. App. 3d 589, 594 (1st Dist. 2003) ("A repudiation may be by words or other conduct" and may occur by a party "insisting that it is obligated to perform only according to its own incorrect interpretation of the contract's terms.") (quotations and citations omitted).

[66] ¶ 16.

[67] *See Stonecipher v. Pillatsch*, 30 Ill. App. 3d 140, 142-43 (2d Dist. 1975) (holding that a party may treat a repudiation as a breach).

possibility the agreement "may reasonably be interpreted in more than one way[,]"[68] in which case "[t]hat ambiguity must be construed against [United], the drafter . . . and in favor of" Plaintiffs.[69] This canon of construction, referred to as *contra proferentem*, typically is applied as "a last resort[,]"[70] but Illinois courts routinely apply it where, as here, one party played no role in drafting the agreement.[71] Indeed, the Contract is one of adhesion that United offered to Plaintiffs and the Class on a take-it-or-leave-it basis. Plaintiffs did not (and could not) negotiate its terms, let alone participate in its drafting.[72] If United desired to prohibit refunds under *any* circumstances, "it could have simply expressed that intent unambiguously in the contract."[73] It did not, therefore, any ambiguity exists because of United. The Court should construe the agreement in Plaintiffs' favor.[74]

B. The United States Department of Transportation's Regulations Are Instructive.

As argued in Section II.A, under the terms of United's Contract, passengers are entitled to a refund for a changed or cancelled flight. For decades, the DOT has required airlines to provide passenger refunds when the airline cancels or significantly changes the passenger's flight, and the passenger does not accept an alternative offered by the airline.[75] United nevertheless argues the DOT regulations requiring refunds are irrelevant as they are not expressly incorporated into the

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[68] *Dyson,* 2019 WL 3037075, at *9 (quotations omitted),

[69] *Yasko v. Reliance Standard Life Ins. Co.*, 53 F. Supp. 3d 1059, 1068 (N.D. Ill. 2014).

[70] *Donahue*, 328 Ill. App. 3d at 166.

[71] *Cf. Tranzact Techs., Ltd. v. Evergreen Partners, Ltd.*, 366 F.3d 542, 546 n.2 (7th Cir. 2004) (refusing to apply doctrine because both parties were involved in drafting agreement).

[72] *See, e.g.*, *Homeowners Choice, Inc. v. Aon Benfield, Inc.*, 550 F. App'x 311, 315 (7th Cir. 2013) (holding "district court did not err in applying *contra proferentem* to construe" insurance policy against carrier that drafted it); *Yasko*, 53 F. Supp. 3d at 1068 (applying canon in action arising from insurance policy insured played no role in drafting).

[73] *Id.*

[74] As noted *supra*, if the Court declines to apply the canon, the meaning of the Contract would "become[] a question of fact for the jury." *Harmon*, 712 F.3d at 1050.

[75] *Enhancing Airline Passenger Protections*, 76 Fed. Reg. 23110-01, at 23129 (Apr. 25, 2011).

Contract. However, Rule 3.B of United's Contract provides "[i]n the event of a conflict between the Rules contained herein and such government laws, regulations, rules, security directives . . . the latter shall prevail." Rule 3.B is not vague; it does not state merely that United will comply with all applicable laws. The Rule specifically asserts that in the event of a conflict, the regulations of governmental agencies shall prevail. United's Contract thus expressly incorporates passengers rights to refunds as required under applicable laws, regulations, rules, or security directives—such as DOT rules—applicable to passenger refunds. And while United argues the Contract does not require it to provide refunds for changed or cancelled flights, the DOT regulations clearly require otherwise. Pursuant to Rule 3.B, if DOT regulations conflict with the Contract, the DOT regulations control and United must issue refunds for cancelled flights.

C. The Airline Deregulation Act Does Not Preempt Plaintiffs' Contract Claim.

The Airline Deregulation Act of 1978's ("ADA") preemption provision states "a State . . . may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation."[76] However, the ADA does not preempt breach of contract claims under state law.[77] The ADA also does not preempt contractual obligations airlines voluntarily undertook—even if they relate to prices, routes, or services.[78] Plaintiffs' breach of contract claim fits within the exception contemplated by the Court in *Am. Airlines, Inc. v. Wolens*.

United's assertion that all cases regarding airfare refunds "fall within the ambit of the

[76] 49 U.S.C. § 41713(b)(1).

[77] *See Am. Airlines, Inc. v. Wolens*, 513 U.S. 219, 232-33 (1995) (holding "the ADA permits state-law based court adjudication of routine breach-of-contract claims").

[78] *See Wolens*, 513 U.S. at 232-33 (1995); *see also Hickcox-Huffman v. US Airways, Inc.*, 855 F.3d 1057, 1064 (9th Cir. 2017) (determining a breach of contract claim is not preempted); *Cox v. Spirit Airlines, Inc.*, 786 F. App'x 283, 285 (2d Cir. 2019) (determining routine contract claims may proceed, which necessarily requires employing tools of state-law contractual interpretation).

ADA" is misleading.[79] In United's cited cases, the plaintiffs' claims were preempted because they attempted to alter the express terms of the Contracts of Carriage.[80] Here, Plaintiffs seek to *enforce* the express terms of, and the reasonable expectations of the parties under, United's Contract. And Plaintiffs seek to challenge the "the retroactive application or modification" of the terms agreed to by the parties[81] given United's subsequent alteration of its refund practices and stated intent to provide only credits for future flights.[82] Ultimately, Plaintiffs allege a breach of contract based on a voluntary undertaking–United's failure to abide by the terms of its Contract. As in *Wolens*, Plaintiffs seek recovery "solely for the airline's BREACH of its own, self-imposed undertakings."[83] Plaintiffs' claims for breach of contract are not preempted by the ADA.

IV. CONCLUSION

Plaintiffs respectfully request that the Court deny United's motion to dismiss; if the motion is granted in any part, Plaintiffs request leave to amend under Fed. R. Civ. P. 15(a)(2) as courts should "freely give leave" to amend pleadings "when justice so requires."

[79] ECF 45 at 14; *Buck v. Am. Airlines*, 476 F.3d 29 (1st Cir. 2007); *Statland v. Am. Airlines, Inc.*, 998 F.2d 539, 541-42 (7th Cir. 1993); *Howell v. Alaska Airlines, Inc.*, 994 P.2d 901 (Wash. App. 2000).

[80] *Buck*, 476 F.3d at 36 (rejecting argument that the term "nonrefundable" was ambiguous and determining plaintiffs were seeking to impose new obligations preempted by the ADA); *Statland*, 998 F.2d at 541-42 (determining plaintiffs state law challenge to the practice of withholding 10 percent of the federal tax on canceled tickets were preempted); *Howell*, 994 P.2d at 905 (determining plaintiff did not seek to enforce to contract according to its terms, but sought to have "nonrefundable" tickets declared unlawful on the grounds of unconscionability and other similar State law contract defenses).

[81] *Wolens*, 513 U.S. at 225.

[82] *Id.* at 225.

[83] *Id.* at 220; ¶ 99.

Dated: October 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned, an attorney, hereby certifies that on October 29, 2020, a true and correct copy of the foregoing was filed electronically by CM/ECF, which caused notice to be sent to all counsel of record.

By */s/ Daniel O. Herrera*
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